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Supreme Court, U.S.
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No. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

ERIC CLEMMONS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A CLAIM IS "FAIRLY PRESENTED" TO THE STATE COURT WHEN THE PRISONER REQUESTS LEAVE TO SUPPLEMENT COUNSEL'S BRIEF ON APPEAL AND THE STATE COURT SUMMARILY DENIES THE REQUEST TO FILE THE SECOND BRIEF THAT MAY OR MAY NOT HAVE INCLUDED THE CLAIM, AND WHEN THE PRO SE MOTION FOR NEW TRIAL RAISES A CLAIM DIFFERENT FROM THE CLAIM THE PRISONER RAISED IN HIS FEDERAL HABEAS CORPUS PROCEEDING.

II.

WHETHER A RIGHT TO CONFRONT WITNESSES AT A PRE-TRIAL DEPOSITION IS A RIGHT THAT IS FIRMLY DICTATED BY THIS COURT'S PAST PRECEDENT IN ORDER FOR A CLAIM BASED ON THAT RIGHT TO BE REVIEWED IN A FEDERAL HABEAS CORPUS PROCEEDING.

III.

WHETHER A FEDERAL HABEAS COURT SHOULD DETERMINE IF CONSTITUTIONAL ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT UPON THE VERDICT, OR THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT, WHEN THE STATE COURT DID NOT HAVE THE OPPORTUNITY TO CONDUCT A HARMLESS ERROR ANALYSIS.

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The August 28, 1997 panel opinion of the United States Court of Appeals granting the petition for writ of habeas corpus is reported at 124 F.3d 944 (8th Cir. 1997), and is included in the Appendix at A-1. The November 22, 1996 panel opinion of the United States Court of Appeals denying the petition for writ of habeas corpus is reported at 100 F.3d 1394 (8th Cir. 1996) and is included in the Appendix at A-33. The District Court's order denying the petition for writ of habeas corpus is not reported, but is included in the Appendix at A-57.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 28, 1997. The motion for rehearing or rehearing en banc was denied on October 7, 1997. Under Supreme Court Rule 13.1 the petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was charged by indictment with first degree murder. Section 565.020, RSMo. 1986. The evidence adduced at trial established that respondent and his victim, Henry Johnson, were inmates at the Missouri State Penitentiary. Petitioner and Johnson were cellmates until they were separated because of problems between the two. Shortly after 9:00 p.m. on August 7, 1985, Officer Thomas Steigerwald approached a group of six or seven inmates standing in a group on the upper lawn near the prison chapel when he observed an inmate clad in a gray sweatshirt strike Johnson in the upper chest. After a short pursuit Officer Steigerwald apprehended respondent. Johnson ultimately died of stab wounds to the heart. Respondent was found guilty of murder in the first degree and was sentenced to death.

Respondent's conviction and sentence were affirmed on direct appeal. ***See State v. Clemmons***, 756 S.W.2d 475 (Mo. banc 1988), ***cert. denied***, 490 U.S. 1113 (1989). Respondent then pursued a post-conviction relief motion in the Circuit Court under Missouri Supreme Court Rule 29.15. Upon denial of that motion, respondent appealed the Circuit Court's denial to the Missouri Supreme Court. Respondent requested permission to supplement the brief filed by post-conviction appellate counsel (A-105). The Missouri Supreme Court denied respondent's request (A-109). The Missouri Supreme Court affirmed the Circuit Court's denial of respondent's post-conviction relief motion. ***See Clemmons v. State***, 785 S.W.2d 524 (Mo. banc), ***cert. denied***, 498 U.S. 882 (1990).

On October 16, 1990, respondent filed a petition for writ of habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri.

An amended petition was subsequently filed. After responsive pleadings and a hearing in the District Court, respondent's petition was denied (A-57).

The United States Court of Appeal for the Eighth Circuit affirmed the District Court's denial on November 22, 1996 (A-33). ***See Clemmons v. Delo***, 100 F.3d 1394 (8th Cir. 1996). After granting respondent's motion for rehearing, the panel reversed itself and the District Court's denial and granted the petition for writ of habeas corpus on August 28, 1997 (A-1). ***See Clemmons v. Delo***, 124 F.3d 944 (8th Cir. 1997). The Court of Appeals concluded that a list of 130 issues attached to a pro se procedural motion fairly presented each of those 130 issues. It also concluded that respondent's rights under the Confrontation Clause were violated when a pre-trial deposition was admitted into evidence without objection at trial where respondent, through counsel, declined to attend the deposition. The Court also concluded that the state did not show this error was harmless beyond a reasonable doubt. Petitioner's motion for rehearing or rehearing en banc was denied on October 7, 1997 (A-104).

REASONS FOR GRANTING THE WRIT

I.

A PRISONERS REQUEST FOR LEAVE TO FILE A SUPPLEMENT COUNSEL'S BRIEF ON APPEAL DOES NOT "FAIRLY PRESENT" CLAIMS WHEN THE STATE COURT SUMMARILY DENIES THE MOTION REQUESTING TO FILE A PRO SE BRIEF NO MATTER IF THE MOTION MAY OR MAY NOT HAVE INCLUDED THE CLAIMS THE PRISONER WANTED TO RAISE IN THE PRO SE BRIEF, NOR IS A CLAIM "FAIRLY PRESENTED" WHEN A PRO SE MOTION FOR NEW TRIAL RAISES A CLAIM DIFFERENT FROM THE CLAIM THE PRISONER RAISED IN HIS FEDERAL HABEAS CORPUS PROCEEDING.

Facile attempts by the lower federal courts to destroy the delicate relationship between state and federal review this Court has nurtured over the past twenty years are matters of importance that warrant a writ of certiorari in that the decision of the Court of Appeals threatens the state courts' ability to decide when a pleading submitted in the state court is properly before the court.

Before the District Court respondent presented a discovery claim based on the State's alleged failure to disclose a memorandum containing a report of an eyewitness who did not see respondent's involvement in the crime. ***Brady v. Maryland***, 373 U.S. 83 (1963). The District Court found a procedural bar to review this claim due to respondent's failure to brief the issue during his state collateral review appeal (A-74-78). The Court of Appeals, however, found in the opinion after rehearing that no bar existed since the claim was one of 130 claims "fairly presented" to the Missouri Supreme Court in a list of issues

attached by respondent to a pro se motion to file a pro se supplemental brief, a motion that was summarily denied by the Missouri Supreme Court.

Attaching lists of issues to a procedural motion should not be deemed to constitute fair presentation of substantive issues to an appellate court. The novel rule adopted by the Court of Appeals will create havoc with the delicate relationship built by this Court between state and federal judiciaries.

This case presents a significant question because it allows this Court to decide when a claim is fairly presented to a state court allowing review of the claim in a federal habeas corpus proceeding under 28 U.S.C. §2254. ***See Picard v. Connor***, 404 U.S. 270 (1971). In ***Duggar v. Adams***, 489 U.S. 401 (1989), this Court stated that "the few cases that respondent and the dissent cite as ignoring procedural defaults do not convince us that Florida Supreme Court fails to apply its procedural rule regularly and consistently". ***Id.*** 410 n. 6. Here, the Court of Appeals relied on only one opinion cited by the respondent in which the Missouri Supreme Court allowed the filing of a pro se brief in support of its holding that the Missouri Supreme Court's denial of respondent's ***motion*** to file a pro se supplemental brief did not act as an independent and adequate state bar. Moreover, the Court of Appeals applied a "unique circumstance" and close enough exception in this case for finding that there was no procedural default. The Court of Appeals reliance on a single Missouri Supreme Court case to find that there was no independent and adequate state bar, and a unique circumstance or close enough exception to the procedural default doctrine, threatens Missouri's procedural requirements for raising claims in state court. Therefore, the grant of certiorari is warranted.

In *Sawyer v. Whitley*, 505 U.S. 333 (1992), this Court held that if a petitioner fails to "follow applicable state procedural rules in raising his claims", he is procedurally barred from raising them in a federal habeas corpus proceeding. *Id.* at 338. The Court of Appeals determined that respondent's *Brady* and Confrontation Clause claim were fairly presented to the Missouri state courts when respondent requested permission to supplement post-conviction counsel's brief (A-10; A-26-27). The Court of Appeals stated that "perhaps [due to the] unique circumstance of this case" we think the *Brady* claim was fairly presented (A-9).[1] The Court of Appeals also determined that respondent's Confrontation Clause claim was fairly presented in his pro se motion for new trial which alleged that the submission of Officer Stiegerwald's deposition at trial was both "unconstitutional and unnecessary in that the witness was not *legally unavailable*", because the claims were close enough (A-25)(emphasis added).

In *Wilwording v. Swenson*, 404 U.S. 249 (1971), this Court held that the exhaustion requirement is met once a federal claim has been fairly presented to the state courts. *Id.* at 250. However, this Court has noted that it is simply not enough to have proceeded through the state courts to say a

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[1] The Court of Appeals also determined that the claim was fairly presented because respondent requested post-conviction appellate counsel to present the additional claims but counsel declined to do so. The Court of Appeals stated that because the client "is and always remains the master of his cause", respondent should not be held responsible for the procedural default (A-9). Of course, this holding that respondent does not bear the burden of post-conviction appellate counsel's actions is contrary to *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) and *Jones v. Barnes*, 463 U.S. 745 (1983).

claim was fairly presented. ***Picard v. Connor***, 404 U.S. at 275-76. In order for a claim to have been fairly presented, the prisoner must present the substantially equivalent claim raised during his state court proceedings in his federal habeas corpus petition. ***Id.*** at 278. While this Court has yet to hold, it would only appear logical that in order for a claim to have been fairly presented to the state court it must comport with the state courts requirement for presenting such a claim. In other words, it is insufficient for a prisoner to invent unavailable motion just to say that the claim was fairly presented to the state court.

In the present case, respondent's counsel filed a brief in the post-conviction appeal on or about December 8, 1989. Shortly thereafter, respondent filed a pro se motion to file a pro se supplemental brief. Respondent alleged in the motion that there were 130 issues respondent wanted to present in his pro se supplemental brief. The Missouri Supreme Court denied the motion to file a pro se supplemental brief on January 23, 1990. No pro se supplemental brief was filed, only the one drafted by counsel. It seems extremely odd that the Court of Appeals found that there was sufficient briefing of the issues when there was no pro se supplemental brief filed.

As in ***Wilwording***, the Court of Appeals found that respondent's claim was fairly presented to the Missouri state courts without citing a single instance in which a request for leave to supplement a brief was granted. ***Id.*** 404 U.S. at 250. Rather, the Court of Appeals relied on one case cited by the respondent in which a pro se brief was filed. Reliance on the acceptance of a pro se brief instead of a request to supplement a brief was unexplained. Nor was it enough for the Court of Appeals to find that respondent's motion to supplement the brief had attached exhibits and documents

listing his ***Brady*** claim.[2]

Giving a state court the opportunity to review a claim is significantly different then properly raising a claim in state court. In order for a claim to be properly raised it must be presented to the state court in accordance with state procedural rules. Likewise, silence on the part of the state rules about particular methods for presenting a claim does not mean that the presentation of the claim was proper. For instance, a prisoner cannot raise a claim of ineffective assistance of counsel in a motion pursuant to a nonexistent rule and then assert that the claim was properly raised to the state court because nothing prohibited the filing of the motion despite the fact that the state rules do not have a rule allowing for such motion. This is in essence what the Court of Appeals found. The Court of Appeals found that because the rules were silent as to the filing of a supplemental brief, the request to file a supplemental brief properly placed the 130 issues before the Missouri Supreme Court.

While the Missouri Supreme Court summarily denied respondent's request to file a supplemental brief, the ruling cannot be deemed to have reviewed the merits of the issues respondent's request wanted to present in a supplemental brief despite the fact that the request attached exhibits. ***See Ylst v. Nunnmaker***, 501 U.S. 797 (1991). The summary denial of respondent's request to supplement post-conviction appellate counsel's brief was proper given that the request

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[2] In fact, the Court of Appeals held that the exhibits and documents were "presumably" in the record before the Missouri Supreme Court (A-9). The Court of Appeals use of the word "presumably" is interesting since the record before the Court of Appeals included only the motion to file a pro se supplemental brief, and not the list of 130 claims to be included.

simply alleged that 130 additional claims should have been raised by his post-conviction appellate counsel. Whether respondent attached exhibits to his request does not change the outcome of the issue, that being whether the claim was fairly presented when he filed a request to supplement the brief.

It appears that the Court of Appeals placed great emphasis on the fact that respondent's request to supplement the brief attached exhibits. Under the Court of Appeals rule, the Missouri Supreme Court should have addressed respondent's ***Brady*** claim, Confrontation Clause claim, and the 128 other claims alluded to in respondent's request to file a supplemental brief. While this Court found in ***Smith v. Digmon***, 434 U.S. 332 (1978), that claims were fairly presented when they were "squarely raised" in the prisoner's brief, it did so only after noting that the State vigorously opposed the claims in their brief. ***Id.*** at 333. In the present case the State never had the opportunity to oppose the claims in the motion because they were never raised in a brief to the Missouri Supreme Court. Therefore, it cannot be said that the claims were fairly presented.[3] Unless the state court actually rules on the claims, ***see Castille v. Peoples***, 489 U.S. 346, 351 (1989), or ignores claims that were raised "as of right", ***Smith v. Digmon***, ***supra***, it cannot be said that the claim has been fairly presented. The Missouri Supreme Court did not actually rule on respondent's claims alluded to in his request to supplement the brief, nor did they ignore claims that were raised as a matter of right. Respondent had no "right" to file a second brief after counsel had already filed one. Thus, the claims were not properly before the state

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[3] Of course, the issues would be fairly presented if (1) the Missouri Supreme Court had granted respondent's motion, and (2) respondent had submitted a pro se supplemental brief that complied with Missouri Supreme Court Rule 84.04.

courts.

The Court of Appeals also erred in finding that the Confrontation Clause claim was fairly presented in the state courts when respondent alleged in his pro se motion for new trial that Officer Stigerwalds' deposition should not have been read during his trial because he was not legally unavailable. Respondent's ground for relief during his federal habeas corpus proceedings alleged that the Confrontation Clause was violated when respondent was not present at the pre-trial deposition. Whether the Confrontation Clause requires respondent to be present at a pre-trial deposition is significantly different than a claim that the deposition was improperly admitted at trial because there was no showing that the person deposed was legally unavailable. The factual and legal theories differ; thus, respondent did not fairly present the Confrontation Clause claim. ***Picard v. Conner***, ***supra***. Because respondent did not present his claim that the Confrontation Clause was violated when he was not present at the pre-trial deposition to the Missouri courts, this claim was not fairly presented to the Missouri state courts to allow review in his federal habeas corpus proceeding. It is not enough that respondent's pro se motion for new trial and federal habeas corpus proceeding cited the Confrontation Clause.

Since neither the ***Brady*** claim, nor the Confrontation Clause claim, was properly submitted to the Missouri courts, the Court of Appeals erred in granting review on these issues.

II.

THE RIGHT TO CONFRONT WITNESSES AT A PRE-TRIAL DEPOSITION IS NOT A RIGHT THAT IS FIRMLY DICTATED BY THIS COURT'S PAST PRECEDENT IN ORDER FOR A CLAIM BASED ON THAT RIGHT TO BE REVIEWED IN A FEDERAL HABEAS CORPUS PROCEEDING.

The Court of Appeals' decision assumes the existence of a Constitutional right to attend a pre-trial deposition that may not be waived by counsel's decision not to procure respondent's attendance at the deposition or by counsel's decision not to object to the deposition's admission into evidence at trial. The mere statement of the Court of Appeals' rule manifests its novelty. This rule should not have been developed or applied retroactively in a habeas corpus proceeding. ***Teague v. Lane***, 489 U.S. 288 (1989). This action by the Court of Appeals creates a significant question for this Court's review. Additionally, the ease by which the Court of Appeals circumvented the ***Teague*** doctrine warrants the Court's use of supervisory authority to review the decision of the Court below.

This case presents to the Court an opportunity to discuss whether past precedent dictates that a defendant has a right to be present at a ***pre-trial*** deposition and whether such presence can be waived by counsel, or whether the Court of Appeals' decision that respondent's right to confront witnesses extends to a ***pre-trial*** deposition was erroneous under ***Teague v. Lane***, ***supra***. ***See Penry v. Lynaugh***, 492 U.S. 302, 312-14 (1989)(holding that ***Teague*** applies in capital cases).

"[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those

rules would be applied retroactively to *all* defendants on collateral review" ***Teague***, 489 U.S. at 316. This means that "unless reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor, [the courts] are barred from doing so now". ***Graham v. Collins***, 506 U.S. 461, 467 (1993), quoting ***Saffle v. Parks***, 494 U.S. 484, 488 (1990). ***Teague*** is a threshold issue. ***Caspari v. Bohlen***, 510 U.S. 383, 389 (1994).[4]

The Court of Appeals held that far from being a new rule, respondent's claim that his right to confront witnesses was violated by his absence from a pre-trial deposition "presents a paradigmatic" violation of the Confrontation Clause (A-27). Rather than citing cases in which this Court has dictated or even suggested there was a right to confront witnesses at a pre-trial deposition, the Court of Appeals chose to analyze respondent's right to be present with general language of this Court discussing the Confrontation Clause (A-28-30).

Not one single decision cited by the Court of Appeals stands for the proposition that a defendant has a right to be present and confront witnesses at a pre-trial deposition. Not one single decision mandates the grant of relief when the

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[4] ***Teague*** requires a three step inquiry. ***See O'Dell v. Netherland***, 117 S.Ct. 1969, 1973 (1997). The first step is to determine when the conviction became final. The second step is to determine whether a state court considering the claim when the conviction became final would have felt compelled by existing Supreme Court precedent to conclude the constitution required ruling in the habeas applicant's favor. The third step is to determine whether a new rule nonetheless falls within one of the two narrow exceptions to the ***Teague*** doctrine.

petitioner, acting through counsel, does not object to the deposition's admission into evidence at trial. The Court of Appeals improperly "stretched" this Court's general language about the Confrontation Clause to explain a grant of habeas relief. ***See Caspari v. Bohlen***, 510 U.S. at 396. This stretch warrants the grant of certiorari supervise and to correct the Court of Appeals' error in extending the Confrontation Clause to pre-trial proceedings.

The Court of Appeals held that respondent's right to confront witnesses at a pre-trial deposition "is not a violation about which reasonable jurists may disagree" (A-29). Yet the Court of Appeals failed to cite one single case in which ***any*** jurist found that the Confrontation Clause was violated by a defendant's absence from a pre-trial deposition. This Court has never held that the use of a deposition is prohibited during a trial. Rather, this Court has held that the use of an out-of-court statement of an unavailable witness ***does not*** violate the Confrontation Clause. ***Ohio v. Roberts***, 448 U.S. 56, 64-66 (1980). In fact, this Court stated in ***Maryland v. Craig***, 497 U.S. 836 (1990), that past precedent merely establishes a "preference" for face-to-face confrontation. ***Id.*** at 849. The use of out-of-court statements is permitted if the reliability of the testimony is assured. ***Id.*** at 850.

As just indicated, the Confrontation Clause is not violated when an out-of-court statement is reliable. The Court of Appeals held that there was no plausible argument that Captain Gross's out-of-court statement was inherently reliable or that cross-examination before the trier of fact in front of respondent and the jury would have been of only marginal value (A-29). However, the District Court noted that such a position is "surely unknowable" (A-67). The problem with these holdings is that they miss the mark on the reliability issue. The question is whether the out-of-court statements could have been sufficiently challenged to tests its

reliability. ***Ohio v. Roberts***, 448 U.S. at 70-72. Here, respondent's trial counsel not only attended Captain Gross's deposition, he actively engaged in the cross-examination of Captain Gross. Counsel did not object to the admission of the deposition. The ability to challenge Captain Gross's out-of-court statements was sufficient enough to give the statements the reliability indicated by this Court. Simply saying that out-of-court statements are unreliable because defendant was not present would be inconsistent with this Court's holding to the contrary and never allow any out-of court statements to be admitted unless the defendant was present no matter how reliable the statements may have been.

The Court of Appeals appears to ignore the fact that this Court has never ***dictated*** a defendants presence at a pre-trial deposition in arriving at their conclusion. Because the Court of Appeals fails to rely on past precedent of this Court to arrive at its ruling, certiorari should be granted to review this claim.

III.

A FEDERAL HABEAS COURT SHOULD DETERMINE IF CONSTITUTIONAL ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT UPON THE VERDICT, RATHER THAN WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT, WHEN THE STATE COURT DID NOT HAVE THE OPPORTUNITY TO CONDUCT HARMLESS ERROR ANALYSIS BECAUSE THE CLAIM WAS NEVER RAISED IN STATE COURT.

This question allows the Court to resolve a conflict in the Circuits on what standard of review should be applied for harmless error when the state court did not have the opportunity to conduct a harmless error review because the prisoner did not raise the claim in state court. This conflict is one that some lower courts have noted, and indeed, some have deferred ruling on harmless error due to the conflict. This conflict is ripe for resolution.

After determining that respondent's Sixth Amendment rights under the Confrontation Clause were violated, the Court of Appeals did not conduct an analysis to determine if respondent showed that the error had a substantive and injurious effect or influence in determining the jury's verdict pursuant to ***Brecht v. Abrahamson***, 507 U.S. 619, 637 (1993). Instead, the Court of Appeals applied the harmless beyond a reasonable doubt standard under ***Chapman v. California***, 386 U.S. 18 (1967) (A-31). The ***Chapman*** standard was applied by this Court in reviewing direct appeals for Constitutional errors. This case gives the Court an opportunity to correct the Court of Appeals on this significant issue and to correct the Court of Appeals' decision in this case which threatens the decisions of state courts by rewarding prisoners who fail to raise claims in their direct

appeal.

In ***Orndorff v. Lockhart,*** 998 F.2d 1426 (8th Cir. 1993), the Court of Appeals wrote that it would not follow ***Brecht*** where the state appellate courts did not have the opportunity to address the harmlessness of the error.

> In the case before us however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the Constitutional error under the ***Chapman*** harmless error standard. As a result, we find that [the] rule announced in ***Brecht*** does not apply and that the ***Chapman*** harmless error standard is the appropriate test in this case.

Orndorff v. Lockhart, 998 F.2d at 1430. The Eighth Circuit's position does not recognize this court's rationale in ***Brecht*** that held "[t]he ***Kotteakos*** harmless-error standard is better tailored to the nature and purpose of collateral review." ***Brecht,*** 507 U.S. at 623. In ***Brecht,*** this Court adopted the ***Kotteakos*** prejudice standard for habeas review due to the high societal cost of the review. ***Brecht v. Abrahamson,*** 507 U.S. at 637, quoting ***Kotteakos v. United States,*** 328 U.S. 750, 776 (1946).

The United States Court of Appeals for the Fourth Circuit, sitting en banc, followed ***Brecht*** and rejected the ***Orndorff*** position in ***Sherman v. Smith,*** 89 F.3d 1134 (4th Cir. 1996) (en banc). The Fourth Circuit joined the Seventh, Tenth and Eleventh Circuit in rejecting the Eighth Circuit's failure to follow ***Brecht. See Castro v. Oklahoma,*** 71 F.3d 1502, 1516 n.14 (10th Cir. 1995); ***Tyson v. Trigg,*** 50 F.3d 436, 446-47 (7th Cir. 1995), ***cert. denied,*** 116 S.Ct. 697 (1996); ***Horsley v. State of Alabama,*** 45 F.3d 1486, 1492 n.

11 (11th Cir.), ***cert. denied***, 116 S.Ct. 410 (1995). The Second and Ninth Circuits have left this issue for decisions at a later date. ***Hanna v. Riveland***, 87 F.3d 1034, 1038 n. 2 (9th Cir. 1996); ***Lyons v. Johnson***, 99 F.3d 499, 503 (2nd Cir. 1996). This Court's decision in ***O'Neal v. McAninch***, 513 U.S. 432 (1995) and ***California v. Roy***, 117 S.Ct. 337 (1996) do not resolve the split between the Circuits since it appears that the state courts conducted harmless error analysis in both these cases.

The present case is an excellent vehicle by which to resolve the conflict. The evidence of respondent's guilt is strong. Respondent does not show how his attendance at Gross's deposition would have helped respondent's case. Nor does respondent show that Gross's live testimony before the jury would have been different. Thus, respondent cannot fulfill his burden under ***Brecht***.

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to resolve the split among the Circuits regarding whether ***Chapman*** or ***Brecht*** applies in federal habeas corpus review when the state court did not have an opportunity to conduct harmless error review.

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that court.

Respectfully submitted,

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